NO. 91-592

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

EUGENE OWEN AND DORA OWEN, Individually and as Next Friend for ALICIA MARIE OWEN, a Minor,
Petitioners

versus

UNITED STATES OF AMERICA
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Louisiana statute R.S. 40:1499.42, limiting medical malpractice damages, *which sets out specific conditions precedent to it's applicability to any person or entity,* limits the tort liability of the United States Government and it's agent physician *when it is undisputed that said conditions precedent to it's applicability were never performed and never occurred,* and the Federal Tort Claims Act mandates that the tort liability of the United States shall be to the same extent and in the manner as an individual under the law of the state.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

NO.____

EUGENE OWEN AND DORA OWEN, Individually and as Next Friend for ALICIA MARIE OWEN, a Minor,
Petitioners

versus

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

The Petitioners, Eugene Owen and Dora Owen, Individually and as Next Friend for Alicia Marie Owen, a Minor, pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals, Fifth Circuit, rendered in these proceedings on July 18, 1991.

OPINIONS BELOW

The opinion of the United States Court of Appeals, Fifth Circuit, *U. S. v. Owen, et al*, appears at Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals, Fifth Circuit, was rendered on July 18, 1991, which appears at Appendix B. Jurisdiction to review by writ of certiorari is conferred on this Court by 28 U.S.C.A. 1254(1).

CONSTITUTION PROVISIONS, STATUTES AND RULES INVOLVED

28 U.S.C. § 2674. Liability of United States

> "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

STATEMENT OF FACTS

The minor plaintiff, Alicia Owen, through the negligence of Army physicians at Ft. Polk, Louisiana, suffered a permanent crippling of her left foot and permanent urinary and bowel incontinence, which will cause continuous urinary dribbling and as she grows older will require frequent catheterizations, which are likely to cause repetitive infections, and a loss of sensation from her anus through her vagina. The evidence showed her to be a mentally bright child, who at four years of age, had already begun to suffer embarrassment over her condition. The Trial Court found negligence of said physicians, proximate cause, and damages in the sum of $3,902,400.00.

At the time of said negligence and trial and at this time, the State of Louisiana had and has a statute that did not apply across the board to all persons lawfully practicing medicine, but which sought to limit recovery against

certain health-care providers, specifically providing that *to be qualified for such damage limitation* a health-care provider *shall* pay a specific surcharge to it's liability insurer, or if self-insured, to the State Commissioners of Insurance. La. R.S. 40:1299:42. *Said surcharge is to be paid by the collector thereof into a trust fund for the benefit of all* medical malpractice claimants, known as the Patients' Compensation Fund. La. R.S. 40:1299:44. The maximum liability for a complying physician is limited to $100,000.00 and said Fund's liability is limited to $400,000.00 for damages in excess of said $100,000.00. The Louisiana statutes further provide that administrative review and action by a medical review board shall be a *prerequisite* to the filing of any malpractice suit *against one who has paid said surcharge and is protected by the act.*

Neither the government nor its agent, who was guilty of the medical malpractice herein, performed the statutory condition precedent to the right to claim the protection of said statutory cap by paying into said fund. Though the *Court of Appeals* opinion *admits* that *any individual who failed to perform said statutory condition precedent could not claim the benefit* of said damage limitation, nevertheless, the Court of Appeals applied said damage limitation in favor of the United States in direct contravention of the mandate of the Federal Tort Claims Act and reduced the minor Plaintiff's recovery to a sum within said damage limitation cap.

REASONS FOR GRANTING WRIT

I.

The United States Court of Appeals has decided herein an important question of Federal law which has not been, but should be settled by this Court.

II.

In rendering a decision that directly contravenes the express congressional mandate of the Federal Tort Claims Act the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Courts power of supervision.

The Federal Tort Claims Act specifically provides that the federal government shall be liable for tort claims, "*in the same manner and to the same extent as a private individual under like circumstance*", *28 U.S.C. 2674.*

The Louisiana courts have correctly held that because its Medical Malpractice Act is in derogation of the general rights available to tort victims, the act must be strictly construed, *Head v. Erath Gen. Hosp., Inc.*, 458 So.2d 579, *Williams v. St. Paul Ins. Co.*, 419 So.2d 1302. The Louisiana courts have further held that *payment of said surcharge into the Patients Compensation Fund and it's continued payment is a condition precedent* for any health-care provider to claim any benefit or protection under any part of the Louisiana Medical Malpractice Act, *Williams v. St. Paul Ins. Co.*, supra. It is elemental that *any litigant asserting a defense* or ground of recovery *which is predicated upon a condition precedent has the burden of pleading and proving* performance of said condition precedent. Such universally accepted principle has been specifically applied by the Louisiana courts to any litigant claiming any protection under said Medical Malpractice Act, *Goins v. Texas State Optical, Inc.*, 463 So.2d 743.

The Court of Appeals arrived at the illogical conclusion that the United States enjoys the damage cap upon the erroneous theory that the only purpose of the *condition precedent of a physician contributing to the Patients' Com-*

pensation Fund is simply to insure that a person *injured by the negligence of a particular physician* who has elected to come within the act will be assured of compensation up to $500,000.00, and that since the United states is solvent in excess of $500,000.00, it has met the objectives of the Louisiana statute and is in *like circumstances* as an *individual who has contributed to the fund if it agrees, after the fact, to pay the $500,000.00.* Said opinion states that the reason a solvent millionaire doctor, who had not contributed to the fund, obviously could not claim the damage cap is because wealth is subject to fluctuation but that the federal government's solvency is certain and perpetual. This far-fetched theory for achieving this misconceived purpose of the Louisiana statute through after the fact judicial fiat, fails to recognize that the money paid into the trust fund is *not just for* the benefit of *persons injured by the particular person or entity that paid same.* Such money paid by a person or entity is for the benefit of *any* person *injured by any other person or entity* who has paid into said fund, even though said other person or entity is insolvent. The government, like any other particular health care provider, might not ever have a malpractice judgment against it in excess of $100,000.00, *but said surcharge money if it had been paid in, would be available for the protection of any person injured through malpractice by other health care providers who had elected to come within the statute* and who had the unusual misfortune of such judgment against it. This is the true purpose of the surcharge payment being an absolute condition precedent to any person or entity obtaining benefit of the statute. *The fact of the government's solvency obviously would not help a victim of malpractice by a non-government physician—payment of the surcharge into the fund would, and such is it's obvious purpose. Such purpose was not fulfilled by the government.* Thus, it follows, if logic and legal principles are not totally discarded, that the F.T.C.A.'s mandatory declaration that the

government shall be liable to the same extent and in the same manner as an individual under like circumstances absolutely prevents the government from claiming the damage limitation of the Louisiana Malpractice Statute. The government cites *Lucas v. United States, supra, Taylor v. United States,* 821 F.2d 1428, *Scheib v. Florida Sanitarium and Benevolence Assn.,* 759 F.2d 859, as authorities for the proposition that said Louisiana statutory damage cap for certain health-care providers limits it's liability. *Said decisions* are all patently correct but *are manifestly not in point as was recognized by the Court of Appeals' opinion.* Every state requires that health providers be licensed in order to *lawfully* provide such care. The Texas, California, and Florida statutes, considered in said decisions, *apply across the board* to *every* person or entity *lawfully providing health care.* Obviously, the government and it's army physicians in said states are *lawfully* providing health-care and *to refuse to accord* said damage cap to the government and it's said physicians would directly contravene the congressional mandate that the government shall be liable for it's torts "in the same manner and to the same extent as a private individual under like circumstances", but here, in this case, *to accord* said damage cap to the government under Louisiana law would be a direct violation of said constitutional mandate for the reason that unlike the Texas, California and Florida statutes, the statute *does not apply across the board* to *all* persons and entities *lawfully providing health-care,* but *applies only* to those persons and entities who have voluntarily initially paid and continue annually to pay a surcharge into a private trust fund to benefit persons injured by malpractice by *any physician* who paid into said fun. The United States District Court in this case recognized this clear distinction, and, thus, correctly decided this case. This distinction was likewise recognized in the Court of Appeals' opinion.

The Court of Appeals cites *Roelofs v. United States,* 501 F.2d 87, as supporting the theory that said federal statutory mandate, that the government tort liability be in the same manner and to the same extent as a private individual under like circumstances, should not be specifically applied in this case because said case holds that though the government did not have a workman's compensation insurance policy, certain defenses accorded individual employers under the state compensation law should be accordedd the government as to it's torts the same as other employers. Said case is clearly correct but not even remotely in point. In *Roelofs v. United States,* supra, the state statute had created a "*statutory employer*", defined as a contractor who hires another contractor or subcontractor to do his work. Said state then denied certain defenses to such *statutory employer* if it failed to carry workman's compensation to protect the employees of such subcontractors. Since, in *Roelofs v. United States,* supra, the government by written contract had required the subcontractor to carry workman's compensation and it's cost was to be billed to the government as part of the contract price, the Court quite correctly held that the government had, for all practical purposes, *fully complied with* and *accomplished the purpose* of the statute and was entitled to the same defense as an individual who had also complied. The Fifth Circuit in said case *noted that it's opinion should not be construed to hold that such defense would be accorded the government if it had not had said contractual provisions.*

Either the express congressional mandate that the United States shall be liable for its torts "in the same manner and to the same extent as a private individual under like circumstances" means something or it means nothing. The Court of Appeals opinion concedes that a private individual who had not complied with the express condition precedent of the Louisiana statute, even if a millionaire,

could not claim the protection of the damage limitation cap. To permit said congressional mandate to be ignored to the extreme detriment of those persons who suffer the most serious and permanent disabilities from government health-care negligence in the state of Louisiana is an injustice that should be corrected by this Honorable Court's grant of a writ of certiorari.

CONCLUSION

For said reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals, Fifth Circuit, and petitioners accordingly so pray.

Respectfully submitted:

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CERTIFICATE

I hereby certify that 3 true copies of the foregoing Petition for Writ of Certiorari have been duly mailed to counsel for the United States of America, D. Bruce La Pierre, Civil Division, Room 3617, Department of Justice, Washington, D. C. 20530.

W. V. Dunnam, Jr.

APPENDIX A

Eugene OWEN and Dora Owen, Individually and As Next Friend For Alicia Marie Owen, A Minor,
Plaintiffs-Appellees,

v.

UNITED STATES of America,
Defendant-Appellant.

No. 90-8195.

United States Court of Appeals,
Fifth Circuit.

July 18, 1991.

Parents filed a Federal Tort Claims Act action against the United States to recover for the negligence of Army hospital physicians who treated their daughter. After a nonjury trial, the United States District Court for the Western District of Texas, Walter S. Smith, Jr., J., found government physicians negligent and awarded $3,902,400 in damages and ruled that United States could not rely on Louisiana's medical malpractice liability cap. The United States appealed. The Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that: (1) although United States had not contributed to patient's compensation fund, it was in like circumstances with private individuals who had contributed to the fund and thus could avail itself of malpractice liability cap, and (2) malpractice liability cap was valid under Louisiana Constitution.

Reversed and remanded.

Appeal From the United States District Court for the Western District of Texas.

Before GOLDBERG, HIGGINBOTHAM, and JONES, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

The United States appeals an order denying it the protections of Louisiana's malpractice liability cap. We conclude that, although it has not contributed to a patient's compensation fund, the United States is in "like circumstances' with private individuals who have contributed to the fund, and that the cap is valid under the Louisiana constitution.

I.

Eugene and Dora Owen, individually and as next friends of their daughter Alicia Marie Owen, filed this action against the United States under the Federal Tort Claims Act to recover for the negligence of physicians at an army hospital in Fort Polk, Louisiana. The Owens contend that the physicians failed to timely detect and diagnose a dermoid cyst in the lower region of Alicia's back.

We reach in this appeal only the issue of the availability of Louisiana's malpractice liability cap to the United States and its validity under Louisiana Law. *See* La.R.S. § 40:1299 (West Supp.1991). After a non-jury trial, the district court found that government physicians were negligent and awarded $3,902,400 in damages. The district court postponed entry of the judgment, however, pending the Louisiana Supreme Court's consideration of the validity of the cap under the state constitution in *Williams v. Kushner*, 549 So.2d 294 (La. 1989), and this court's con-

sideration of the availability of the liability cap as a defense to the United States in *Simon v. United States*, 891 F.2d 1154 (5th Cir. 1990).

When neither court reached the relevant issue, the district court concluded that the United States could not rely on the cap because it had not contributed to a patients' compensation fund as required by the statute. His decision conflicted with that of the only other Louisiana district court to have considered the issue. *See Kennedy v. United States*, 750 F.Supp. 206 (W.D.La.1990). The United States now appeals to this court, and we reverse.

II.

[1] The Owens first contend that the United States did not properly present the cap issue to the district court. We disagree. As the district court noted in its opinion, the United States both pled § 40:1299.42 as a defense in its second amended answer and set forth the cap as one of its contentions in the pre-trial order. The Owens emphasize that the United States listed the cap as a contention, and not a disputed issue, in the pre-trial order. They quote extensively from *Simon v. United States*, 891 F.2d 1154 (5th Cir.1990), where we held that the United States waived § 40:1299.42 as a defense by failing to raise it until after trial in a Fed.R.Civ.P. 59(e) motion to alter or amend the judgment. In *Simon*, we described the cap as an issue that was at least partially factual, and we rejected the United States' contention that the Rule 59(e) motion was a "pragmatically sufficient time" to raise the defense because we believed that it would have changed "the character of the trial" had it been raised earlier. *Id.* at 1159. The fact that the United States both pled the cap and specifically noted it in the pre-trial order distinguishes *Simon*. The Owens clearly had sufficient notice that the United States would rely on § 40:1299.42.

III.

[2] Louisiana cannot by its law make the United States liable. The United States is liable only to the extent it waives sovereign immunity, here by the Federal Tort Claims Act. "The United States shall be liable ... in the same manner and to the same extent as a private individual under like circumstances...." 28 U.S.C. § 2674. As true with all statutes waiving the sovereign immunity of the United States, we must strictly construe § 2674. *Levrie v. Department of Army*, 810 F.2d 1311, 1314 (5th Cir.1987).

In *Lucas v. United States*, 807 F.2d 414 (5th Cir.1986), this court held that Texas' malpractice liability cap limited the liability of the United States under § 2674. The Texas statute in *Lucas* capped civil liability of "physicians and health care providers" at $500,000, not including necessary expenses. *See* Tex.Rev.Civ.Stat. Art. 4590i, § 11.02 (Vernon 1986).[1] Lucas argued that § 11.02 was not available to the United States because the statute defined "health care providers" to include only state-licensed persons and facilities and, thus, to exclude federal facilities. We were persuaded that this argument rested upon an erroneous assumption—that Texas law controlled the scope of the federal government's waiver of immunity. Texas did provide a cap to the liability of certain types of defendants and Texas law defines these types. Which of the types are under like circumstances is, however, a federal question. That is, a state can create a liability scheme, but the threshold inquiry into the scope of the federal government's consent to be sued remains. That consent was only to the liability of individuals in like circumstances. The relevant question, then, was whether the federal defend-

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[1] The Texas Supreme Court, on certification of *Lucas*, found § 11.02(a) unconstitutional under the Texas constitution. *Lucas v. United States*, 757 S.W.2d 687 (Tex.1988).

ants were in "like circumstances" as the private health-care providers subject to § 11.02.

The Ninth Circuit relied on *Lucas* in concluding that Californis'a malpractice liability cap, quite similar to the Texas cap, was available to the United States. *Taylor v. United States,* 821 F.2d 1428 (9th Cir.1987). Similarly, the First and Eleventh Circuits have allowed the United States the benefit of state collateral source statutes even though the statutes expressly applied only to state-licensed persons and facilities. *See Reilly v. United States,* 863 F.2d 149 (1st Cir.1988); *Scheib v. Fla. Sanitarium & Benev. Ass'n,*759 F.2d 859 (11th Cir.1985).

[3] Louisiana's malpractice liability cap differs from the caps at issue in *Lucas* and *Taylor.* Like the Texas and California statutes, § 40:1299.42 is not available across the board to all health care providers; instead, the statute imposes two additional conditions on the cap. First, the defendant must have filed with the state insurance commissioner proof of financial responsibility. And second, the defendant must have contributed to a patients' compensation fund. *See* §40:1299.42(A)(1) and (2). Section 40:1299.42(B) limits recoverable damages, excluding necessary expenses, to $500,000, limits the liability of health care providers to $100,000, and provides for payment of damages between $100,000 and $500,000 from the patients' compensation fund.

[4] This appeal thus presents a somewhat more difficult question than *Lucas* and *Taylor.* As the United States is clearly solvent, in any relevant sense, the complication is that the federal government never contributed to the compensation fund. The United States has offered to pay damages of up to $500,000 plus necessary expenses. But, of course, a private health care provider could not,

after the fact, gain the protection of § 40:1299.42 by such an offer. *See Abate v. Healthcare Intern.*, 560 So.2d 812 (La.1990); *Williams v. St. Paul Ins. Companies*, 419 So.2d 1302 (La.App. 4th Cir.1982). Nonetheless, we are persuaded that the United States is entitled to the protections of § 40:1299.42.

The "Like circumstances" inquiry is not overly stringent. As we explained in an earlier case:

> [The FTCA] is given broad interpretation to effectuate the legislative aim of putting citizen and national sovereign in tort claim suits on a footing of equality as between private parties within that state. Nice pieces of casuistry and hypersensitive legalisms are avoided.

Roelofs v. United States, 501 F.2d 87, 92 (5th Cir.1974). *Roelofs* itself involved a provision in the Louisiana Workers' Compensation statute that immunized from third party suits entities that either carried compensation insurance for their contractors' employees or paid their compensation benefits. This court held that the immunity was available to the United States because, by contract, it required its contractor to maintain compensation insurance and agreed to reimburse the expense. We reasoned that, through the alternative scheme, "the goals of Louisiana and the United States [were] mutually met." *Id.* at 93.

In identifying persons in like circumstances, we find it significant that state health care providers do not contribute to the compensation fund. Rather, a separate provision, § 40:1299.42, limits their liability to $500,000, not including necessary expenses. Like state providers, the United States does not contribute to the compensation fund, but neither does it drain the fund. And while the wealth of even "millionaire doctors"is subject to fluctua-

tion, the federal government's relevant solvency is certain and perpetual. In sum, the, because the United States has met the objectives of § 40:1299.42, it is in "like circumstances" with private individuals who have contributed to the fund and therefore enjoy capped liability.

IV.

[5] The Owens alternatively argue that the cap is invalid under Louisiana's constitution. The Louisiana Supreme Court has three times confronted, though never fully decided, the validity of the cap under the Louisiana constitution.[2] First, in *Sibley v. Board of Sup'rs of Louisiana*, 462 So.2d 149 (La.1985), a case involving a state health care provider, the Court held that § 40:1299.42 is valid under the due process and equal protection clauses of both the federal and state constitutions and the access to the courts clause of the state constitution. The Court later granted rehearing on several issues, however, including the validity of the cap under the equal protection clause of the state constitution. In its second opinion, the Court expressly rejected the federal equal protection analysis employed in its first opinion and announced a new framework giving more than minimal scrutiny to non-suspect classifications. *See Sibley v. Board of Sup'rs of Louisiana*, 477 So.2d 1094 (La.1985). The Court remanded to the trial court for further proceedings to determine if the statutory classification in § 40:L1299.42, a classification based on physical condition, furthers an appropriate state interest. The case subsequently settled. *See Deegan v. Raymond Int'l Builders, Inc.*, 518 So.2d 1082, 1085 n. 1 (La.App. 5th Cir.1987).

There were two appellate decisions between *Sibley II* and the third relevant Supreme Court decision. In *Williams*

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[2] The Owens do not raise any federal constitutional issues.

v. Kushner, 524 So.2d 191 (La.App. 4th Cir. 1988), a case involving a private health care provider, Louisiana's Fourth Circuit addressed the question left open in *Sibley II* and concluded that the cap is valid under the state's equal protection clause because the classification based on physical condition furthers the state's interest in the availability of medical care. The Fourth Circuit also upheld the cap under the access to the courts clause of the state constitution.

The following year, in *LaMark v. NME Hospitals, Inc.,* 542 So.2d 753 (La.App. 4th Cir.1989), the Fourth Circuit again faced the constitutional issue, but with a new twist. The appellants argued that § 40:1299.42 violates the state's equal protection clause because of a second statutory classification, a classification based on the number of claimants per act of malpractice. This argument rested on the fact that the $500,000 cap is the total recoverable per act of malpractice, regardless of the number of claimants. The Fourth Circuit concluded that this second classification also furthers the state's interest in the availability of medical care.

Finally, in *Williams v. Kushber,* 549 So.2d 294 (La.1989) (per curiam), the Supreme Court affirmed the Fourth Circuit's decision in *Williams*. The Court granted the writ to finally decide the constitutional issue, but upon closer analysis, concluded that the issue was not properly before it because the attending physician settled with the plaintiff before trial for $100,000. The Court did, however, uphold the portion of the statute limiting recovery from the compensation fund to $400,000. *See also Stuka v. Fleming,* 561 So.2d 1371, 1373 n. 7 (La.1990) (noting but not reaching the constitutional issue); *Eving v. Aubert,* 566 So.2d 616 (La.1990) (concluding that the appellant was without standing to raise the constitutional issue).

[6] The United States urges that the cap is valid under the Louisiana constitution, the Owens, urge that it is invalid, and both urge, as an alternative, that we certify the issue to the Louisiana Supreme Court. In diversity cases, in the absence of a controlling precedent by the highest court of the state, this court generally defers to the holdings of lesser courts "unless we are convinced by other evidence that the state law is otherwise." *Lucas*, 807 F.2d at 418; *accord Bailey v. Southern Pacific Transportation Co.*, 613 F.2d 1385, 1388 (5th Cir.1980).

In *Lucas*, after reviewing several state appellate decisions finding the Texas cap unconstitutional, we decided to certify the issue to the Texas Supreme Court for three reasons. First, it was unclear whether the relevant appellate decisions were based on the federal or state constitution. Second, the fact that the Texas Supreme Court initially granted a writ in one of thecases evidenced that court's concern. The Court ultimately denied the writ, but cautioned that the appellate court need not have addressed the constitutional issue. Finally, the Court's resolution of other issues under the relevant constitutional provisions left us unable to predict their view with confidence.*See Lucas*, 807 F.2d at 418-21.

[7] This case is different. The Louisiana Supreme Court spelled out the state constitutional inquiry in *Sibley II;* and in *Williams*, the Fourth Circuit closely followed *Sibley II* in concluding that the cap is valid under the state's equal protection clause. The Owens point to the dissenting opinions in *Sibley II* and *Willaims* as an indication that the Supreme Court would find the cap invalid under the state constitution, but as we read the dissents, only one of the justices has clearly found the cap unconstitutional. *See Williams*, 549 So.2d at 308-12. It is true that the Court initially granted a writ to review *Williams:*

as in *Lucas*, this could indicate concern. It may equally be no more than a felt need to lay the issue to rest. Thus, this fact *alone* does not justify certifying the issue to the Louisiana Supreme Court. Instead, we defer to the Fourth Circuit's decision in *Williams* and conclude that the cap is valid under the state constitution.

V.

Because we conclude that Louisiana's malpractice liability cap is available to the United States, we need not reach the remaining issues on appeal. In sum, then, we conclude that the federal is entitled to the cap's protections because it is in "like circumstances" as private health care providers subject to the cap and that the cap is valid under the Louisiana constitution.

The judgment of the district court is REVERSED and the case REMANDED for further proceedings consistent with this opinion.

A True Copy
Test

Clerk, U.S. Court of Appeal, Fifth Circuit

By /s/ Allison Granier
Deputy

New Orleans, Louisiana
Sep. 9 1991

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 90-8195

U.S. COURT OF APPEALS
FILED
JUL 18 1991

D.C. Docket No. CA W 88 0081

EUGENE OWEN and DORA OWEN,
Individually and as Next Friend
For Alicia Marie Owen, A Minor,
Plaintiffs-Appellees,

versus

UNITED STATES OF AMERICA,
Defendant-Appellant.

U. S. DISTRICT COURT
FILED
SEP 11 1991

Appeal from the United States District Court for the Western District of Texas

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Before GOLDBERG, HIGGINBOTHAM and JONES, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is reversed, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that plaintiffs-appellees pay to defendant-appellant the cost on appeal to be taxed by the Clerk of this Court.

July 18, 1991

ISSUED AS MANDATE:
SEP 9 1991

A true copy
Test

Clerk, U.S. Court of Appeals, Fifth Circuit

By /s/ Allison Granier
Deputy

New Orleans, Louisiana
Sept 1991

No. 91-592

DEC 12 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

EUGENE OWEN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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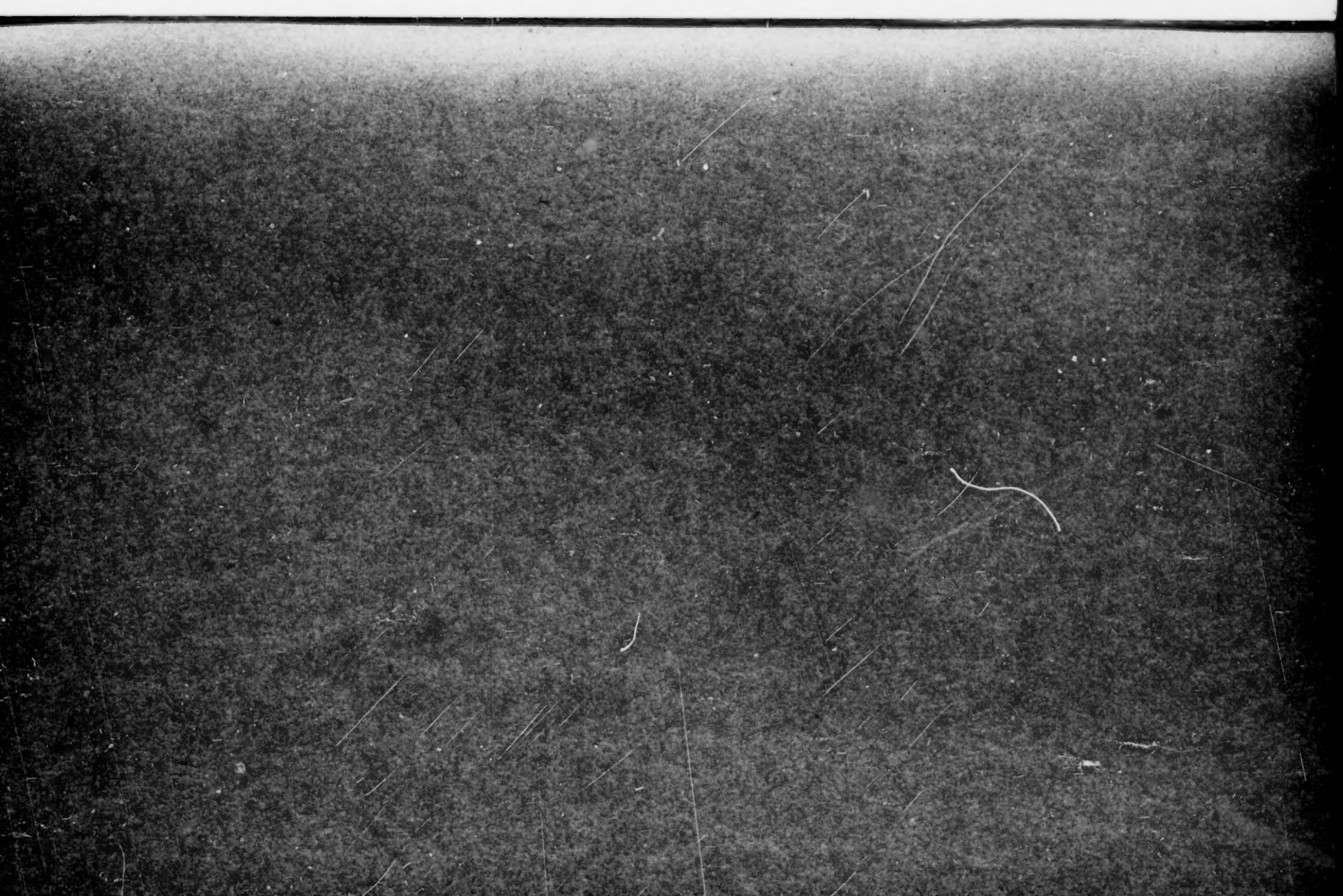

QUESTION PRESENTED

Whether the Louisiana Medical Malpractice Act, which imposes a ceiling on the amount recoverable in a medical malpractice action against qualified health care providers, limits the damages that may be recovered from the United States in an action under the Federal Tort Claims Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-592

EUGENE OWEN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-10a, is reported at 935 F.2d 734. The pertinent opinions of the district court, App., *infra*, 3a-9a, 10a-13a, 14a, are unreported.

JURISDICTION

The judgment of the court of appeals, Pet. App. 11a-12a, was entered on July 18, 1991. A petition for rehearing was denied on August 29, 1991. App., *infra*, 1a-2a; 943 F.2d 734 (Table). The petition for a writ of certiorari was filed on October 8, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners sued the United States under the Federal Tort Claims Act (FTCA) on behalf of their daughter, Alicia Owen, who was injured when Army doctors at Fort Polk, Louisiana, negligently failed to timely detect and diagnose a dermoid cyst. Pet. App. 2a. The FTCA makes the United States liable in tort "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 2674. Liability is determined "in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b).

After trial, the district court held that the Army doctors' negligence had caused the petitioners $3,902,400 in damages. Pet. App. 2a. However, Louisiana's Medical Malpractice Act limits the amount that can be recovered in "all malpractice claims for injuries to or death of a patient, exclusive of future medical care and related benefits" to "five hundred thousand dollars plus interest and cost." La. Rev. Stat. Ann. § 40:1299.42(B)(1) (West Supp. 1991). In addition, the liability of each qualified health care provider is limited to $100,000 per claim. *Id.* § 40:1299.42(B)(2). If, after each liable health care provider has paid its $100,000, the claimant is not fully compensated and the $500,000 recovery limit has not been reached, the state's "Patient's Compensation Fund" makes up the shortfall, although in no case can the total recovery exceed $500,000. See *id.* § 40:1299.42(B)(3). The Patient's Compensation Fund is maintained through charges assessed against qualified health care providers. *Id.* § 40:1299.41(A).

Louisiana's Malpractice Act, however, only applies to claims against "qualified" health care providers. *Id.* § 1299.41(D). The statute defines "health care

provider," in relevant part, as "a person, partnership, corporation, facility, or institution licensed by this state to provide health care or professional services." *Id.* § 40:1299.41(A)(1). To be "qualified" under the Act, a health care provider must do two things. First, it must file with the state commissioner of insurance "proof of financial responsibility," *id.* § 40:1299.42(A)(1), by showing that it has a malpractice insurance policy of "at least one hundred thousand dollars per claim," or if the provider is self-insured, by demonstrating "financial responsibility in excess of one hundred thousand dollars." *Id.* § 40:1299.42(E). Second, the provider must pay its share of the charge assessed to maintain the Patient's Compensation Fund. *Id.* § 40:1299.42(A)(2).

Separate statutory provisions govern malpractice claims against persons providing health care on behalf of the State. See *id.* §§ 40:1299.39, 40:1299.391. Those provisions limit recovery for injury or death of any patient to $500,000, plus interest and costs, exclusive of future medical care and related benefits. *Id.* § 40:1299.39(F). The State neither contributes to nor draws from the Patient's Compensation Fund.

2. After calculating damages at $3,902,400, the district court considered the applicability of Louisiana's medical malpractice recovery limit.[1] The court concluded that Louisiana's $500,000 limitation on recovery did not apply to the United States because the

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[1] The district court originally postponed entry of judgment pending the resolution of cases involving the constitutionality of the limitation and its availability to the United States under the FTCA. Pet. App. 2a-3a. When neither case resulted in a decision on the relevant issues, the district court addressed the questions on its own.

federal government does not contribute to the statute's Patient's Compensation Fund. Pet. App. 3a.[2]

3. The court of appeals reversed. It noted that the federal government is liable in tort not because Louisiana has the power to impose such liability, but because the FTCA provides that the United States shall be liable "in the same manner and to the same extent as a private individual under like circumstances." Pet. App. 4a (quoting 28 U.S.C. 2674). The court observed that federal appellate decisions had held that Texas and California medical malpractice limitations were available to the United States in suits under the FTCA, even though federal health care providers do not obtain state licenses, because state law could not "control[] the scope of the federal government's waiver of [sovereign] immunity." Pet. App. 4a.

The court recognized that the Louisiana statute differed from the Texas and California statutes insofar as it required private health care providers to qualify for coverage by filing proof of financial responsibility and contributing to the Patient's Compensation Fund. Pet. App. 5a. But since the United States "is clearly solvent, in any relevant sense," the court observed, "the complication is that the federal government never contributed to the compensation fund." *Ibid.*

Noting that the "like circumstances" test is not "overly stringent," the court concluded that the United States was entitled to the protection of the Louisiana limitation. Pet. App. 6a. The court found it "significant" that state health care providers do not contrib-

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[2] The United States made no claim that it was entitled to the $100,000 limitation of liability for individual health care providers.

ute to the compensation fund, yet nonetheless enjoy the benefit of the $500,000 recovery ceiling. *Ibid.* Just like the state health care providers, federal health care facilities neither contribute to nor "drain the fund." *Ibid.* Finally, the court explained that the purpose of ensuring adequate compensation was met because the federal government's "relevant solvency is certain and perpetual." Pet. App. 7a. As a result, the court concluded that the federal government had "met the objectives" of the Louisiana statute and was in like circumstances with "qualified" private health care providers. *Ibid.* It therefore concluded that petitioners' recovery under the FTCA was limited to the $500,000 permitted by the Louisiana Medical Malpractice Act.[3]

ARGUMENT

The court of appeals correctly applied the Federal Tort Claims Act. There is no conflict between its decision and any decision of this Court or of any court of appeals. Further review is therefore unwarranted.

1. The FTCA is a "limited waiver" of the federal government's sovereign immunity from suit. *United States* v. *Orleans*, 425 U.S. 807, 813 (1976). Like all such waivers, it must be "strictly construed." *First Nat'l Bank in Brookings* v. *United States*, 829 F.2d 697, 700 (8th Cir. 1987); *Levrie* v. *Department of Army*, 810 F.2d 1311, 1314 (5th Cir. 1987). Subject to certain exceptions not relevant here, see 28 U.S.C. 2680, the FTCA provides that the United

[3] The court rejected petitioners' contentions that the United States had waived reliance on the Louisiana limitation and that the limitation was unconstitutional as a matter of state law. Pet. App. 3a, 7a-10a. Petitioners do not ask this Court to review either of these rulings.

States is liable in tort actions "to the same extent as a private individual under like circumstances," 28 U.S.C. 2674.

The statutory language refers not to private persons under the *same* circumstances as the federal government, but to those under "like"—or similar—circumstances. See, *e.g.*, *Indian Towing Co.* v. *United States*, 350 U.S. 61, 64 (1955). In this regard, the FTCA implicitly recognizes that "the federal government could never be exactly like a private actor," and thus "a court's job in applying the standard is to find the most reasonable analogy." *LaBarge* v. *County of Mariposa*, 798 F.2d 364, 367 (9th Cir. 1986), cert. denied, 481 U.S. 1014 (1987).

2. The court of appeals' conclusion in this case represents precisely such a practical application of the FTCA's "like circumstances" test. The United States is indisputably a health care provider in Louisiana. It operates numerous medical facilities in the State, including the army hospital at Fort Polk, which perform medical services indistinguishable from those performed by "qualified" Louisiana health care providers. It also, like qualified health care providers, ensures that those injured by its malpractice can recover on their judgments up to the $500,000 ceiling. The fact that the federal government does not comply with particular conditions of state law—including Louisiana's requirement that health care providers pay into a state compensation fund—does not destroy that similarity.[4]

a. It is well settled that satisfaction of the FTCA's "like circumstances" test does not turn on federal

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[4] Petitioners do not contend that the United States would be required to file proof of financial responsibility, although filing of such proof is also a precondition to qualification for private providers.

compliance with the specific requirements of state law. Thus, the courts of appeals have uniformly held —in decisions that petitioners acknowledge are "patently correct," Pet. 6—that the FTCA entitles the United States to the benefits of state malpractice liability limitations even where state law excludes them from coverage for failing to obtain state licenses. *Taylor* v. *United States*, 821 F.2d 1428, 1431 (9th Cir. 1987), cert. denied, 485 U.S. 992 (1988); *Lucas* v. *United States*, 807 F.2d 414 (5th Cir. 1986). Accord *Starns* v. *United States*, 923 F.2d 34, 37 (4th Cir.), cert. denied, 112 S. Ct. 54 (1991). These decisions recognize that the States have no power to require federal providers to obtain state licenses, and thus the fact that such licenses are not obtained cannot undermine the conclusion that federal and private providers are in "like circumstances." [5]

In this case, the State of Louisiana is no more able to require the federal government to pay a surcharge into the Patient's Compensation Fund than it can require federal health care facilities to obtain state licenses. Accordingly, Louisiana's fund contribution requirement is no more relevant to the "like circum-

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[5] See also *LaBarge*, 798 F.2d at 366-367 (where federal government did not qualify for coverage under state workmen's compensation law but operated compensation scheme similar to workmen's compensation, the most reasonable analogy was a private employer covered by state workmen's compensation law); *Simpson* v. *United States*, 652 F.2d 831 (9th Cir. 1981) (regardless of whether California's recreational use statute was intended to apply to public as well as private landowners, it must be applied to limit the United States' liability in an FTCA action for injuries to a user of a national forest recreation area); *Mandel* v. *United States*, 719 F.2d 963 (8th Cir. 1983) (similar result under Arkansas recreational use statute).

stances" inquiry than is its licensing condition.

Petitioners attempt to distingush the licensing cases on the ground that state licensing requirements apply "across-the-board" to all health care providers. Pet. 6 (emphasis omitted). But the relevant issue is the state's *power* to impose such a requirement on the federal government, not the *scope* of the requirement. Because Louisiana has no power to require contributions by federal facilities, the requirement cannot be taken into account in determining whether federal facilities are in like circumstances to private health care providers. To hold otherwise would be to permit the State of Louisiana to control the scope of the waiver of sovereign immunity in the FTCA, and to deprive the United States of the same opportunity that all private health care providers in Louisiana have to limit their malpractice liability.

b. In any case, it simply makes more sense to analogize federal health care providers to private providers who qualify under the Louisiana scheme than to those who do not. As petitioners concede, the United States would be in like circumstances with qualified health care providers if it had "for all practical purposes, fully complied with and accomplished the purpose of the statute." Pet. 7 (original emphasis omitted); see *Roelofs* v. *United States*, 501 F.2d 87, 92 (5th Cir. 1974), cert. denied, 423 U.S. 830 (1975). Where petitioners err is in asserting that the United States has not done so.

Congress has provided in the Judgment Fund, 31 U.S.C. 1304, a permanent and continuing appropriation for the satisfaction of FTCA judgments against the United States. Because of the fund's "certain and perpetual," Pet. App. 7a, solvency, the federal government effectively provides a guarantee that it can pay

malpractice awards against it in the same way that the Louisiana Act seeks to guarantee payment for malpractice committed by qualified private health care providers. In sharp contrast, private health care providers that do not qualify under the Louisiana Act—because they fail to carry insurance and do not maintain sufficient funds to self-insure—provide no such guarantee; as the court of appeals observed, Pet. App. 6a-7a, the assets of even the wealthiest nonqualifying providers are necessarily "subject to fluctuation." And because there is no possibility that a patient injured by the United States' negligence will ever draw on the fund, there is no reason for the United States to contribute to it.

Petitioners, however, argue that the money paid into the Patient's Compensation Fund benefits not only those injured by the provider who made the payments, but also "any person injured by any other person or entity" who paid into the fund, since presumably not every qualifying health care provider will have a malpractice judgment rendered against it. Pet. 5 (emphasis omitted). They therefore infer that the "true purpose" of the contribution requirement is to make funds "available for the protection of any person injured through malpractice by other health care providers who had elected to come within the statute." *Ibid.* (emphasis omitted). Because the United States has not contributed to the fund, they contend, it has not met the objective of providing for injuries caused by other fund contributors. *Ibid.*

The statute is directly to the contrary. It limits not just recoveries for injuries caused by health care providers that contribute to the fund, but for injuries caused by those that do not. In particular, persons providing health care on behaif of the State are not

required to contribute to the fund, but recoveries on claims against them are still limited to $500,000—even though requiring them to make fund contributions would advance petitioners' supposed statutory purpose of making funds available to those injured by other contributors. That state health care providers are exempt from contribution but are nonetheless shielded by the recovery limit belies petitioners' notion that the recovery cap is entirely contingent on contributing to a fund used solely to satisfy claims against other providers.

Far from being an essential component of the $500,000 recovery limit, the Patient's Compensation Fund is an adjunct: the fund makes up the shortfall between payments made by all liable health care providers and the $500,000 recovery limit, thereby ensuring that medical malpractice plaintiffs can collect up to $500,000 in damages while each individual health care provider never pays more than $100,000 per claim. See p. 2, *supra*; La. Rev. Stat. Ann. §§ 40:1299.42(B)(1) and (B)(2) (West. Supp. 1991). Because the United States is clearly able to satisfy all judgments against it and will never draw upon Louisiana's Patient Compensation Fund to make up the difference between its payment and the $500,000 ceiling, the objectives of the Louisiana Act are met without requiring the United States to contribute to the fund. Accordingly, the court of appeals correctly concluded that, under the FTCA, Louisiana's $500,000 ceiling on medical malpractice recoveries limited the damages available in a medical malpractice claim against the United States.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1991

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-8195

EUGENE OWEN and DORA OWEN, Individually, and as Next Friend for Alicia Marie Owen, A Minor,
PLAINTIFFS-APPELLEES

versus

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Western District of Texas

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ON SUGGESTION FOR REHEARING EN BANC
(Opinion 7-18-91, 5 Cir., 198—, —— F.2d ——)

(August 29, 1991)

Before GOLDBERG, HIGGINBOTHAM and JONES, Circuit Judges.

PER CURIAM:

(x) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled

on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED.

The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of its (Federal Rules of Appellate Procedure and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS WACO DIVISION

Civil No. W-88-CA-081

EUGENE OWEN and DORA OWEN, Individually and as Next Friend for ALICIA MARIE OWEN, a Minor,
PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court, having duly heard and considered the pleadings, evidence and argument of counsel on the 14th and 15th of June, 1989, now makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. This is a medical malpractice suit brought by Eugene Owen and Dora Owen, individually and as next friends for Alicia Marie Owen, a minor. Defendant is the United States of America, sued under the provisions of the Federal Tort Claims Act 28 U.S.C. Section 1346(b), 2671 *et seq.*, for injuries suffered by Plaintiffs as a result of the Defendant's alleged negligence in the care and treatment of Alicia Marie Owen during the period from her birth, March

10, 1985 through September 23, 1985. Plaintiffs alleged that Defendant was negligent in failing to detect, diagnose or refer to a neurosurgeon or other specialist for evaluation, a cyst in the lower region of Alicia Owen's back.

2. The Bayne-Jones Army Community Hospital at Fort Polk, Louisiana, is an agency of the Government of the United States of America.

3. The Plaintiffs have submitted written claims (Standard Forms 95) to the appropriate agency pursuant to the provisions of the Federal Tort Claims Act.

4. Plaintiffs filed suit in the United States District Court on March 9, 1988.

5. Between March 10, 1985 and September 23, 1985, Alicia Marie Owen was examined and treated by physicians and staff acting for and on behalf of Defendant.

6. Physicians at Bayne-Jones Army Community Hospital at Fort Polk, Louisiana, during the period between March 10, 1985 and September 23, 1985, failed to detect or diagnose a cyst in the lower portion of Alicia Owen's back. Such failure violated reasonable standards of medical care, particularly since Alicia's mother and both grandmothers had detected the cyst at a very early age and Alicia's mother had pointed out the cyst to Dr. Stutes. Such failure constitutes negligence as defined by Louisiana Law.

7. The issue as to whether earlier detection would have mattered is hotly contested. The Court finds the testimony of Drs. Saxton and Lorenzen more compelling on this issue, and finds from a preponderance of the evidence that had the Defendant's physicians detected and diagnosed the cyst before Alicia was three or four months old, immediate surgery would

have been medically appropriate, and according to reasonable medical probability, would have resulted in little, if any, significant neurological defect. Thus, the Court determines that under the law of Louisiana, the negligence of Defendant was a proximate cause of Alicia's neurological defects.

8. In March, 1986, Alicia was seen at the pediatric clinic at Scott & White Memorial Hospital, Temple, Texas, a non-government hospital, and Alicia's mother was advised to see a neurosurgeon for evaluation of the child's cyst. Alicia was seen by Dr. Davis, a neurosurgeon at Scott & White Memorial Hospital, who recommended that a CT scan be utilized to further evaluate the cyst. The results of the CT scan showed the mass to be superficial to the lumbodoral facis with no evidence of extension into the spinal canal. He then recommended that the mass be removed surgically under general anesthesia.

9. In May, 1986, Alicia was seen at the Neurology & Headache Clinic in Temple, Texas by Dr. John Landherr of the Temple Neurosurgical Clinic for surgical evaluation. On June 3, 1986, another CT scan was performed. Based upon the CT scan, a sinus tract and dermoid cyst were diagnosed.

10. Surgery to remove the cyst and tract was performed on June 5, 1986. Difficulties in removing the cyst were noted in the surgical record. After surgery, Alicia had a "dropped" left foot, urinary incontinence, loss of bowel movement control, and loss of sensation in her saddle area. Alicia walks with a marked limp and frequently falls when she runs. While she can likely have children, whether she will be able to enjoy sexual pleasure cannot be determined. Alicia's neurological deficits and her inability to walk without a pronounced limp are permanent and cannot

be medically or surgically improved; in all other respects she is a normal four year old girl.

11. In considering damages, the Court finds that the following elements were proved and are recoverable under Louisiana law: diminished earning capacity, future pain and suffering and mental anguish, and physical embarrassment or loss of enjoyment of life.

a) *Diminished earning capacity.*

No one can determine by what amounts the Plaintiff's income will be diminished during her work-life. She is four years old and has a work-life expectancy of forty-eight years. The Plaintiff will have a permanent limp and a lack of control over her urine and bowel movements. To determine that she will have a diminished income of $20,000.00 per year is to select a conservative amount. The total over her expected work-life would be $960,000.00, which under Louisiana law must be discounted to present value after considering inflationary increases. To reduce by a net 6%, to $902,400.00 would be more than fair to the Defendant.

b) *Pain and mental anguish*

The Plaintiff is a pretty four year old girl, normal in all respects except for the permanent injuries she has sustained. This case does not involve a plaintiff injured at birth who will never realize that she is different. According to the evidence, she will eventually have to learn to catheterize herself several times daily, an unpleasant procedure at best. This is in addition to the other problems she will have to live with for the rest of her life. An award of

$1,500,000 for this element is, again, a conservative amount to compensate any person for such a loss.

c. *Physical embarrassment or loss of enjoyment.*

The embarrassment of urinary inconsistency, loss of bowel movement control and a permanent limp, especially when combined with a possible denial of sexual pleasure are matters which simply cannot be compensated for by monetary awards. However, since our system requires such, a conservative award of $1,500,000 for a lifetime of such infirmity is also conservative.

12. Plaintiffs have contracted with their attorneys to pay 25% of any recovery. The Court construes the contract to provide for a payment of 25% to include not only attorney's fees but reimbursement for all expenses expended by Plaintiffs' attorneys. W.V. Dunnam, Jr. and Joe Barron are, therefore, entitled to judgment for 25% of the Plaintiffs' recovery or $990,000.00.

13. In the event Louisiana's limitation on recovery is applicable, then Plaintiffs are limited to recovery of $500,000.00, of which Plaintiff's attorneys are entitled to recover 25%.

14. Any of the foregoing findings of fact which may be deemed to constitute conclusions of law shall be so considered.

CONCLUSIONS OF LAW

1. This is an action for medical negligence brought against the United States under provisions of Federal Tort Claims Act 28 U.S.C. Section 1346(b), 2671 *et seq.*

2. The United States, as sovereign, is immuned from suit except to the extent that it consents to be

sued, and the terms of its consent are as set forth expressly and specifically by Congress which define the parameters of the Federal District Court's jurisdiction on entertained suits brought against it. *Honda v. Clark*, 386 U.S. 489, 501 (1967), and the authorities cited therein.

3. Herein, the alleged negligent acts or omissions occurred in Louisiana; accordingly, Louisiana Law governs the issues of liability. 28 U.S.C. Section 1346(b), 2674. Under Louisiana Law, "Tort" means any breach of duty or any negligent act or omission proximately causing injury or damage to another. Louisiana Revised Statute Section 9:2794.A., states in pertinent part that in a malpractice action the Plaintiff shall have the burden of proving:

A. The degree of knowledge or skill possessed or the degree of care ordinariily exercised by physicians; and

B. That the defendant either lacked this degree of knowledge or skill or failed to use reasonable care and diligence, along with his best judgment in the application of that skill; and

C. That as a proximate result of this lack of knowledge or skill or the failure to exercise this degree of care, the Plaintiffs' suffered injuries that would not have otherwise been incurred.

4. Plaintiffs have established by a preponderance of the evidence that Defendant's physicians failed to undertake a mode of treatment which a reasonable and prudent member of the medical profession would have undertaken.

5. Plaintiffs have established by a preponderance of the evidence that the Defendant's physicians' acts

or omissions were a proximate cause of the injuries which Alicia Owen and her parents have suffered.

6. The Louisiana Supreme Court has pending consideration of the constitutionality of R.C. 40:1299.42 in *Williams v. Kushner*, Dkt. =88-C-1153 and 11 88, 526 So.2d 785. The United States Court of Appeals for the Fifth Circuit has pending the issue of whether R.C. 40:1299.42 applies to the United States in *Simon v. United States*, Dkt. =88-2141.

7. If the Louisiana limit on recovery, R.S. 40:1299.42 is applicable to this case, the full recovery is limited to $500,000.00 or $375,000.00 to Plaintiffs and $125,000.00 to Plaintiffs' attorneys.

8. If the Louisiana limit on recovery, R.S. 40:1299.42 is held to be unconstitutional, then the full recovery is $3,902,400.00 or $2,926,800.00 to Plaintiffs and $975,600.00 to Plaintiffs' attorneys.

9. Any of the foregoing conclusions of law which may be deemed to constitute findings of fact shall be so considered.

The Court has been advised that the Louisiana Supreme Court should rule on the constitutionality of R.S. 40:1299.42 in September of 1989. Judgment will not be entered until that determination is made, and or until the Fifth Circuit Court of Appeals has determined the statute's applicability to the United States.

SIGNED this 12 day of July, 1989.

/s/

WALTER S. SMITH, JR.
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

Civil No. W-88-CA-081

EUGENE OWEN and DORA OWEN, Individually and as Next Friend for Alicia Marie Owens, a Minor,
PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

ORDER

Came on to be considered the judgment to be entered in this case.

On July 2, 1989, Findings of Fact and Conclusions of Law were filed. Conclusion 6 noted that the Louisiana Supreme Court had pending before it the question of the constitutionality of La. R.C. 40:1299.42 in *Williams v. Kushner*. In *Simon v. United States*, the United States Court of Appeals for the Fifth Circuit had pending before it the question of whether that statute, which limits to $500,000.00 damages recoverable for medical malpractice, applies against the United States in suits under the Federal Tort Claims Act.

In September of 1989, the Louisiana Supreme Court rendered its opinion, holding that the constitutionality of the statute was not properly before it. Now, on January 16, 1990, the United States Court of Appeals

for the Fifth Circuit has rendered its opinion, holding the United States is procedurally barred in *Simon* from raising the defense because it is an affirmative defense which had not been plead.

Hence, this Court must now determine whether the Louisiana statute applies to the parties in this case.

Initially, the Court notes that the United States did plead the limiting statute in the Eighth Defense of its Second Amended Answer, and notice of the Government's reliance on the statute was again set forth in the pre-trial order. No waiver is present in this case.

The Louisiana statutory scheme limits recovery from a single health care provider to $100,000.00. An additional $400,000.00 can be recovered from the Patient's Compensation Fund into which all qualified health care providers pay an annual surcharge.

28 U.S.C. § 2674 provides the United States shall be liable in tort ". . . in the same manner and to the same extent as a private individual under like circumstances." [1] The United States and its agencies do not pay into the Louisiana Patient's Compensation Fund. The Louisiana statute is designed to protect only those health care providers which contribute to the fund. A Louisiana health care provider which did not contribute would not have its liability limited. *Williams v. St. Paul Insurance Company*, 419 So. 2d 1302 (1982). The key is the unique scheme of the Louisiana statute which does not apply across the board to *all* health care providers, but to only those electing to avail themselves of its advantages. This differs from

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[1] The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

other states where all parties legally providing health care are included.

The courts of Louisiana have held that payment into the Patients' Compensation Fund is a condition precedent for a health care provider to claim the benefits of the statutory protection, and must be plead. *Goins v. Texas State Optical, Inc.*, 463 So. 2d 743 (1985). Obviously, the United States did not, and could not, plead and prove such a condition precedent in this or any case.

The United States cites *Roelofs v. United States*, 501 F.2d 87 (5th Cir. 1984) and *LaBarge v. County of Mariposa*, 798 F.2d 364 (9th Cir. 1986). In *LaBarge*, the Ninth Circuit held that the Federal Employees Compensation Act was the equivalent of worker's compensation insurance so that the United States was entitled to the same defenses a California employer would enjoy.

Roelofs dealt with a similar question involving worker's compensation in the state of Louisiana. Under Louisiana law, contractors who were covered by worker's compensation insurance were immune from third party liability. The argument was that the United States could not accept the benefit (immunity) without the burden (purchasing compensation insurance). The Fifth Circuit Court of Appeals answered that argument by recognizing that as a part of its contract, it required the contractor, *at government expense*, to purchase worker's compensation insurance. That, the Court stated was "the key." "Whether the result would be the same if the Government contract did not require maintenance of compensation insurance is a matter for another day." *Roelofs*, at 93, 94.

The court in *Roelofs* mentions that the aim of the Louisiana legislature was to assure compensation

benefits to employees of contractors doing work for others. It seems obvious that Louisiana's aim in its Malpractice Act was twofold: to assure that all victims of medical malpractice could collect on a judgment up to $500,000.00, and that no health provider would face unlimited exposure for malpractice. The Louisiana legislature would certainly not have the authority and probably not the desire to afford the same benefit to the United States or victims of its malpractice.

A close question with scant authority is presented. This Court is fully aware that a final decision will be made by others. The last sentence of the *Roelofs* opinion convinces that if this is "another day," a different result will follow.

Accordingly, the Court makes the additional conclusion of law that the Louisiana Medical Malpractice Acts' cap on liability does not apply to the United States. Judgment will enter for the full amount of Plaintiffs' damages.

SIGNED this 31st day January, 1990.

/s/ _____

WALTER S. SMITH, JR.
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

Civil No. W-88-CA-081

EUGENE OWEN AND DORA OWEN, Individually and as Next Friend for ALICIA MARIE OWEN, a Minor, PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

JUDGMENT

In accordance with the findings of facts and conclusions of law entered by the Court in this case on July 2, 1989, and the Court's Order of this date, Judgment is entered as follows:

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiffs, Eugene Owen and Dora Owen, Individually and as Next Friend for Alicia Marie Owen, A Minor, have and recover from Defendant, United States of America, the total amount of $3,902,400.00 in damages, with $975,600.00 of this amount awarded to Plaintiffs' counsel, W. V. Dunnam, Jr. and Joe Barron, for attorneys fees and expenses.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that costs of court are to be borne by

Defendant, for which let execution issue if not timely paid.

SIGNED this 21st day of January, 1990.

/s/ _____

WALTER S. SMITH, JR.
United States District Judge

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